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VOLUME V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 498

IN THE MATTER OF CRIMINAL CONTEMPT OF THOMAS C. McCONNELL, PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 14, 1961
CERTIORARI GRANTED DECEMBER 11, 1961

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APPENDIX.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

STATEMENT REQUIRED BY RULE 12(c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1. The style of the court and the title of this case are as shown in the above heading.
2. Time of commencement of suit: This action was commenced through entry of an order on May 10, 1960, (which was amended on May 12, 1960) whereby the court held appellant in direct contempt of court and continued imposition of sentence to June 30, 1960. On that date the court entered a further contempt order and certificate, adjudging appellant in direct contempt and sentencing him to confinement for a period of ten
2 days on each of three specifications described in said contempt order and certificate, said sentences to run concurrently.
3. The names of the parties hereto are as follows:
   (a) Appellant: Thomas C. McConnell
   (b) Appellee: United States of America.
4. The several dates when the respective pleadings were filed: No indictment was returned or information filed against appellant, nor did appellant receive notice of the facts constituting the alleged contempt as required by Rule 42(b) of the Federal Rules of Criminal Procedure. The court below further refused appellant an opportunity to answer or otherwise plead to the acts of contempt charged. On July 7, 1960, appellant filed a motion to arrest judgment and order of June 30, 1960, and to vacate the same and for trial before an impartial judge, which motion was denied by the court below on September 15, 1960.

5. Whether defendant was arrested, bail taken or property attached: On September 15, 1960, the court entered an order permitting appellant to remain at liberty upon furnishing personal bond without surety in the sum of $100 during the pendency of this appeal and until the mandate of this court is issued and filed on this appeal and an order entered thereon.
6. Time when trial was held: The court below refused to grant appellant either a trial or a hearing as required by Rule 42(b) of the Federal Rules of Criminal Procedure.
7. Name of the trial judge: Honorable Julius H. Miner.
8. No question was referred to a commissioner, master or referee.
9. The court below denied appellant trial by jury.
10. The contempt order and certificate was entered by the court below on June 30, 1960, but did not become final until appellant's motion to arrest judgment and vacate the same was denied on September 15, 1960.

3 11. Appellant's notice of appeal and bond were filed on September 21, 1960.

Thomas C. McConnell
Thomas C. McConnell, *pro se*
Francis J. McConnell,
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Thomas C. McConnell

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

STATEMENT REQUIRED BY RULE 12(c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. The style of the court and the title of this case are as shown in the above heading.

2. Time of commencement of suit: This action was commenced through entry of an order on May 10, 1960, (which was amended on May 12, 1960) whereby the court held appellant in direct contempt of court and continued imposition of sentence to June 30, 1960. On that date the court entered a further contempt order and certificate, adjudging appellant in direct contempt and sentencing him to confinement for a period of ten days on each of four specifications described in said contempt order and certificate, said sentences to run concurrently.

5 3. The names of the parties hereto are as follows:
(a) Appellant: Lee A. Freeman
(b) Appellee: United States of America.

4. The several dates when the respective pleadings were filed: No indictment was returned or information filed against appellant, nor did appellant receive notice of the facts constituting the alleged contempt as required by Rule 42(b) of the Federal Rules of Criminal Procedure. The court below further refused appellant an opportunity to answer or otherwise plead to the acts of contempt charged. On July 7, 1960, appellant filed a motion to arrest judgment and order of June 30, 1960, and to vacate the same and for trial before an impartial judge, which motion was denied by the court below on September 15, 1960.

5. Whether defendant was arrested, bail taken or property attached: On September 15, 1960, the court entered an order permitting appellant to remain at liberty upon furnishing personal bond without surety in the sum of $100 during the pendency of this appeal and until the mandate of this court is issued and filed on this appeal and an order entered thereon.
6. Time when trial was held: The court below refused to grant appellant either a trial or a hearing as required by Rule 42(b) of the Federal Rules of Criminal Procedure.
7. Name of the trial judge: Honorable Julius H. Miner.
8. No question was referred to a commissioner, master or referee.
9. The court below denied appellant trial by jury.
10. The contempt order and certificate was entered by the court below on June 30, 1960, but did not become final until appellant's motion to arrest judgment and vacate the same was denied on September 15, 1960.
11. Appellant's notice of appeal and bond were filed on September 21, 1960.

Lee A. Freeman,
Lee A. Freeman, *pro se*
Brainerd Currie,
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Attorney for
Lee A. Freeman

Lee A. Freeman
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7 P L E A S had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of June, being the 6th day thereof, in the Year of Our Lord One Thousand Nine Hundred Sixty and of the Independence of the United States of America, the 184th Year.

Present:

Honorable William J. Campbell, Chief District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Julius J. Hoffman, District Judge
Honorable Julius H. Miner, District Judge
Honorable Julius H. Miner, District Judge
Honorable Edwin A. Robson, District Judge

Also Present:

Honorable Albert B. Maris, Senior United States Circuit Judge for the Third Circuit
Honorable Omer Poos, United States District Judge for the Southern District of Illinois
Honorable John J. Kilkenny, United States District Judge for the District of Oregon

Sitting pursuant to designation.

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Thursday, June 30, 1960

Court Met Pursuant to adjournment

Present: Honorable Julius H. Miner, Trial Judge

8

IN THE UNITED STATES DISTRICT COURT

Thursday, June 30, 1960
Present: Honorable Julius H. Miner, District Judge

• • (Caption—No. 56 C 323) • •

It Is Ordered by the Court that five (5) days herefrom be and hereby are given to the plaintiff to file its objections herein.

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IN THE UNITED STATES DISTRICT COURT

Thursday, June 30, 1960
Present: Honorable Julius H. Miner, District Judge

• • (Caption—No. 56 C 323) • •

The Court's own motion to suspend the contempt sentences imposed on this date on Lee A. Freeman and Thomas C. McConnell, if said Lee A. Freeman and Thomas C. McConnell will file a petition of retraction and apology, is entered and continued to September 15, 1960 at 10:00 A.M., and it is

Ordered that execution of said sentences be and hereby is stayed until September 15, 1960 at 10:00 A.M.

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

CONTEMPT ORDER AND CERTIFICATE

In conformity with Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that the criminal contempts set forth below were committed in the actual presence of the Court on the dates shown below and were

seen and heard by the Court at said times during the trial of the case in *Parmelee Transportation Company* v. *John L. Keeshin, et al.*, No. 56 C 323 in this Court, which commenced on April 21, 1960, and ended on May 10, 1960. It is obvious from the record and transcript in this cause, and more especially cited herein, that the defendants Lee A. Freeman and Thomas C. McConnell, both attorneys for the plaintiff herein, embarked upon a course of unprofessional, unethical, intimidating, insulting, defiant,
11 unfair and improper behavior, to foist their will upon the Court and jury and to dominate the course of procedure herein without regard to an honest and impartial administration of justice.

I find that the acts, statements, and conduct of each of the defendants hereinafter specified constituted contumacious conduct of so grave a character as to make imposition of fines insufficient punishment.

It Is Therefore Ordered And Adjudged that Lee A. Freeman is found guilty of direct contempt and that he be and is sentenced to confinement for a period of ten days on each of specifications numbered 1, 2, 3 and 4 below, such sentences to run concurrently, and he is hereby remanded to the custody of the Attorney General of the United States or his representative for the purpose of serving such sentence; and

It Is Ordered And Adjudged that Thomas C. McConnell is found guilty of direct contempt and that he be and is sentenced to confinement for a period of ten days for each of the acts specified in specifications 5, 6 and 7 numbered below, such sentences to run concurrently, and he is hereby remanded to the custody of the Attorney General of the United States or his representative for the purpose of
12 serving such sentence.

Specification Number 1

On April 28, 1960, in the presence and hearing of the jury, the following occurred:

"By Mr. Freeman:

"Q. Was the railroad service limited in substantial respects with respect to the railroad passengers that had available to them these transfer coupons?

"By Mr. Keating: Same objection, as a conclusion.

"By the Court: The same ruling.

"By Mr. Freeman: That is crazy." (Trans. 856-857)

Specification Number 2

On April 29, 1960, out of the presence and hearing of the jury but in open court, Mr. Freeman made the following statement to the Court:

"Your Honor, may I, with all deference, inquire whether or not this memorandum that was entered by you on December 6 has any significance or shall it be completely ignored?

"It seems to be, Your Honor, that you are willing to ignore those instances, and I will point out another one to Your Honor where you have ruled that documents are admissible, but at any time I seek to present a document that you have ruled admissible, there is a waving of arms on my learned counsels' side, and an immediate denial.

13 "I think, Your Honor, that if there is to be a reconsideration of this memorandum, it should be reconsidered for both sides and not for one side, and let me just in this connection point out that you have during the course of this trial rejected the Soo Line exhibits, which are exhibits, Plaintiff's Exhibits 11, 12 and 13.

"These three documents were submitted in our list of documents that we intended to offer as Item 43, and there was an objection made by the defendant railroads joined in by counsel for the other defendants, that these documents were internal documents, immaterial and hearsay, and on page 9 of this memorandum of

opinion that you rendered on December 2, 1959, on page 5, rather, those objections are overruled.

"The Soo Line memoranda are to be considered admissible there and Your Honor has changed his ruling again, and it occurs to me, and I say it again with all due deference, that no favorable ruling that we have gotten in the past from you will stick, but every unfavorable ruling will be reiterated, and I don't think that is a fair trial." (Trans. 959-960)

Specification Number 3

Repeatedly during the course of the trial Lee A. Freeman conducted himself in a contumacious manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court, by sneering and laughing on occasions when the Court ruled against him and by disregarding admonitions of the Court with respect to his conduct before the jury.

14 *Specification Number 4*

On January 26, 1960, in the presence of the Court before the jury was impaneled during the course of a hearing on its memorandum dated December 4, 1959, which constituted the Court's rulings on the admissibility of numerous documents which had been tendered by the plaintiff for use in the trial and objected to by the defendants, Mr. Freeman, among other things, referred to several of the Court's December 4th rulings as demonstrating "a sardonic sense of humor" (page 52, Trans. of Proceedings, January 6, 1960), thereby charging the Court with bitter, heartless, scornful, insincere and disdainful conduct. The Court referred specifically to the above quoted statement of counsel (at page 9 of the memorandum), as well as to other abusive remarks of counsel, and ruled that there was no merit to counsel's objections to and arguments upon the Court's pre-trial memorandum, dated December 4, 1959 aforesaid.

Specification Number 5

On April 21, 1960, prior to the selection of a jury, although Thomas C. McConnell, by his own statement, had read the transcript of the previous hearing in the cause at which the Court of its own motion suggested that consideration be given to separation of the issue of public injury for trial (Trans. 4, 5), and although no such suggestion or motion had been made by any attorney for any defendant at any hearing in the case, Mr. McConnell stated as follows:

> "This should be a forum where we could have that lawsuit tried without being hemmed in and penned in with a lot of artificial restrictions, dreamed up by counsel on the other side, whereby we are not given an opportunity to tell this jury what this lawsuit is about."

Specification Number 6

On April 27, 1960, in the presence and hearing of the jury, after the Court had instructed the attorneys for plaintiff to refrain from repeatedly asking questions on subjects which the Court had ruled was not admissible, in the presence of the jury as distinguished from an offer of proof outside the presence of the jury (Trans. 578, 580), the following occurred:

> "By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it.
>
> "By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case.
>
> "By Mr. McConnell: We have a right to ask them.
>
> "By the Court: You can offer proof on it.
>
> "By Mr. McConnell: We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a

right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us." (Trans. 581)

Specification Number 7

Repeatedly during the course of the trial Thomas C. McConnell conducted himself in a contumacious manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court and disregarding admonitions of the Court with respect to his conduct before the jury.

/s/ *J. H. Miner*
Judge

Jun 30 1960

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

MOTION TO ARREST JUDGMENT AND ORDER OF JUNE 30, 1960, AND TO VACATE THE SAME AND FOR A TRIAL BEFORE AN IMPARTIAL JUDGE
(filed Jul 7 1960)

Now comes Thomas C. McConnell and moves to arrest and vacate the order of contempt and certificate entered against him herein on June 30, 1960, by Judge Julius H. Miner, and for a trial before an impartial judge, and for reason shows:

1. That the contempt order and certificate was untimely and this court has lost jurisdiction to deal with the alleged contempt summarily since the alleged contempt occurred several months prior to the entry of the contempt order and certificate and on at least two occasions the trial judge stated that there was no emergency about the contempt matter; that it is only where there is a need

for "immediate penal vindication of the dignity of the
18 court" that the court may properly exercise summary powers under Rule 42(a) of the Federal Rules of Criminal Procedure

2. That this defendant was entitled to have the issues asserted by said judge as contempt of court tried before an impartial judge pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure; that in the instant case, the trial judge not only entered specifications of contempt long after the alleged contumacious acts occurred, but acted as witness and prosecutor without permitting this defendant any hearing and then proceeded to act as a judge and convict this defendant of such charges without due process of law, contrary to the rights of this defendant as preserved to this defendant by the federal statutes and the Constitution of the United States.

3. That one of the items alleged as contumacious consisted of the remarks of Lee A. Freeman on January 26, 1960, almost four months before the trial of the instant case, and in his specifications the presiding judge refers to Freeman's remarks as "charging the Court with bitter, heartless, scornful, insincere and disdainful conduct"; that these remarks disclose that the court is dealing with the alleged contempt as a personal attack upon himself and he thereby becomes a party involved in the controversy and, as stated by the Supreme Court in the case of *Offutt* v. *United States*, 348 U.S. 11, 13-15:

19 "A judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

Here, unbeknownst to this defendant, Judge Miner was nursing a grievance against trial counsel months before the trial started, and was obviously prejudiced against

Parmelee's lawyers; that before the jury was called in, a motion for a change of venue was made before Judge Miner which he summarily denied, and it now appears that at that time Judge Miner knew that he was prejudiced and could not afford the plaintiff a fair trial, and obviously had no right to try this defendant for contempt not only because the alleged contempt represented an alleged attack upon the trial judge, but also because of the prejudice of the trial judge against plaintiff's counsel; that the decisions of the Supreme Court clearly indicate that if speed is not a crucial factor, fundamental fairness and the desirability of maintaining public respect for the judicial office compel the appointment of an impartial tribunal to hear charges of contempt. Thus, the Supreme Court of the United States held in *Offutt* v. *United States, supra,* that if a contempt is alleged to have been committed in the presence of the judge and the judge postpones his treatment of the contempt until a later time, he must disqualify himself from presiding at a later contempt hearing.

4. That the acts of this defendant, alleged by the presiding judge to have been "contumacious conduct" under Specification Number 5, occurred on April 21, 1960, over two months prior to the entry of the instant order and prior to the selection of a jury in this case; that the acts and remarks of this defendant set forth in such specification not only were not contumacious as is hereinafter shown, but could only have been dealt with summarily at that time, and that too great a lapse of time has occurred to permit this court to deal with the matter under Rule 42(a); that such remarks were not contumacious, but constituted legitimate legal argument. Thus, the court quotes from a part of the oral argument made by this defendant on the issue of public economic injury as follows:

"This should be a forum where we could have this lawsuit tried without being hemmed in and penned in with a lot of artificial restrictions dreamed up by counsel on the other side whereby we are not given an opportunity to tell this jury what this lawsuit is about."

That the entire argument shows beyond question that the restriction this defendant was talking about was the recognition of the issue of public economic injury as a relevant and proper issue in an antitrust case in the face of two decisions of the United States Supreme Court which had ruled decisions of the United States Supreme Court which had ruled in complete conformity with this defendant's remarks; that the only case relied on by the trial judge to contravene counsel's statement was the so-called *Radiant Burner* case, decided by the Court of Appeals for this Circuit, which has since that time been accepted for review on writ of certiorari by the Supreme Court and
21 thereby has lost all value as a precedent; that the issue, just as this defendant asserted, was first raised in a motion to dismiss filed by defendants' counsel and was argued in their briefs and their argument, and was overruled by the late Philip L. Sullivan, Judge of this court; that this defendant's statement was factually true and legitimately argued; that there was no charge, inference or intendment made that the subject of the issue had been other than properly raised and with all due respects to the proprieties of proper legal procedure and that no attack on the trial judge or opposing counsel was intended or even thought of in the making of such remark; that no charge was ever made or intended or even thought of and that no statement was made to the court which in any way affected the integrity or the propriety of the court's raising the issue; that the argument was direct to the point that the court's handling of the matter was clearly er-

roneous, contrary to all the decisions of the Supreme Court which had dealt with the matter and could not be sustained legally and no other point was made; that in the case of *Offutt* v. *United States*, 348 U. S. 11, 13-15, in speaking of the power of a judge to punish summarily for contempt, the Supreme Court said:

> "The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges are also human and many in a human way quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against the easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer."

22 • • • (*sic*)

23 5. That the occurrence specified as Number 6 in the contempt order occurred on April 27, 1960, over two months prior to the entry of the instant order and could only have been dealt with under Rule 42(a) at that time and, in any event, the instant order comes too late to be entered as a summary order; that the right asserted by this defendant in such specification and to which this court takes exception was necessary in making out an offer of proof as is shown by the following facts; that the instant case charges that Hugh W. Cross prostituted his high office of Commissioner of the Interstate Commerce Commission by utilizing the power of that office before which the railroads had proceedings pending involving millions of dollars to importune the railroads to drop the services of the Parmelee Company and substitute the services of Keeshin's company, with which company Cross intended to go to work; that the defendants made a motion to dismiss these charges from the case, which motion was overruled

by the late Judge Philip L. Sullivan; that under the rulings of the presiding judge in the instant case, counsel for plaintiff were told that they could not ask any questions concerning the defendant Cross; that when so limited, this defendant offered to stipulate with defense counsel that an offer of proof as to Cross and the conspiracy issues be made outside the presence of the jury; that defend-
24 ants' counsel refused to so stipulate and asserted that under Rule 43(c) of the Federal Rules of Civil Procedure, the only way an offer of proof could be made was to put the witness on the stand and ask a question and, only after an objection was sustained to the question, could an offer of proof be made outside the presence of the jury; that in the face of such objection, this defendant believed and still believes that the only way a record on appeal could be made was to ask the question and have an objection sustained to the question; that in this situation, this defendant stated to the court, as the court alleges:

> "Now you are trying to tell us we can't ask these questions. We have a right to ask these questions. We are going to ask them because it is our prerogative in doing it.
>
> "By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross because I have ruled specifically, definitely and completely that it is not an issue in this case."

That Judge Sullivan had ruled that it was an issue in the case and the presiding judge had stated that he was not overruling Judge Sullivan's decision; that later the presiding judge admitted that plaintiff's counsel had a right to make an offer of proof on this issue and, in an opinion rendered at the end of the case, said:

> "The complaint also alleged that in order to induce the railroads to vote in favor of Keeshin's proposal, Cross promised to give them favorable consideration

in matters pending before the Interstate Commerce Commission and that he did give them favorable consideration. It is to be observed that these allegations found no support in plaintiff's elaborate offers of proof * * *."

25 That there is no such allegation in the complaint, but the court's statement shows that it was necessary for this defendant to insist in the firmest possible manner on the plaintiff's right to make offers of proof because any imperfections in said offer would be and were used against the plaintiff's case by the presiding judge; that in these circumstances, to assert the client's right without fear of intimidation was not only not contumacious, but was absolutely necessary in order to perform defendant's duty to his client.

6. That the acts set forth in Specification Number 7, as well as the adjectives used at pages 1 and 2 of the order, are conclusory in nature and mere conclusions of fact and do not conform to the requirements as to specifications of the facts which are set forth in Rule 42(a) of the Federal Rules of Criminal Procedure. Further, the record does not support the court's statement that this defendant "conducted himself in a contumacious manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court and disregarding admonitions of the Court with respect to his conduct before the jury."

7. That this defendant is not only entitled to a trial and a hearing before an impartial judge, but also before a jury under the Fifth and Sixth Amendments of the Constitution of the United States and, if granted such trial, this defendant is prepared to show that he did not, as al-

26 leged, embark upon a course of unprofessional or unethical conduct, nor did he attempt to intimidate or insult the presiding judge or to manifest defiance towards the court or to foist his will upon either the court or the

jury, nor did he attempt to dominate the course of procedure in the court, but this defendant acted without fear or favor in an attempt to protect the rights of his client in this case and in order to make a record on appeal so that the case could be properly reviewed and the manifest error of the trial court overruled in the Court of Appeals for the Seventh Circuit; that this defendant had no other purpose and acted for no other motive.

8. That in the contempt order and certificate this court stated that "the acts * * * constituted contamacious conduct of so grave a character as to make imposition of fines insufficient punishment," and this court has sentenced defendant to a ten-day jail sentence as a penalty for each alleged contempt. But in open court the judge announced that such jail sentence would be suspended if this defendant would file a petition of retraction and apology; that this defendant is accused of unethical and unprofessional conduct by such trial judge, which charge is denied and is not supported by any evidence; that this defendant has practiced law for almost thirty-six years in this court, in the courts of this state, in other federal courts and in the Supreme Court of the United States, in accordance
27 with the canons of ethics of the legal profession; that the option of apologizing for something of which this defendant is not guilty or of going to jail is an option which only a coward would accept, and it is refused by this defendant without any equivocation whatever; that this defendant's acts and conduct were within the scope of his duty to protect the legal rights of his client and in no instance was there any intent by this defendant to in any wise be disrespectful of the trial judge or to reflect upon his authority.

For all of the above reasons, this defendant asks that the order of contempt be vacated as against him and likewise against his co-counsel, Lee A. Freeman, and that the

charges of contempt as made by the presiding judge be sent to the Executive Committee of this court for assignment for hearing before another judge on issues made, pursuant to the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure.

Thomas C. McConnell
Thomas C. McConnell

Thomas C. McConnell
134 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-9131

28

IN THE UNITED STATES DISTRICT COURT

Thursday, July 7, 1960
Present: Honorable Julius J. Hoffman, District Judge

• • (Caption—No. 56 C 323) • •

Comes Thomas C. McConnell and presents his motion to arrest the judgment and order herein of June 30, 1960, and to vacate the same, and for a trial before an impartial judge, and it is

Ordered that said motion be entered and be and hereby is continued before Judge Julius H. Miner.

29

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

MOTION TO ARREST JUDGMENT AND ORDER OF JUNE 30, 1960, AND TO VACATE THE SAME AND FOR A TRIAL BEFORE AN IMPARTIAL JUDGE.
(Filed Jul 7 1960)

Now comes Lee A. Freeman and moves to arrest and vacate the order of contempt and certificate entered against

him herein on June 30, 1960, by Judge Julius H. Miner, and for a trial before an impartial judge, and for reason shows:

1. That the contempt order and certificate was untimely and this court has lost jurisdiction to deal with the alleged contempt summarily since the alleged contempt occurred several months prior to the entry of the contempt order and certificate and on at least two occasions the trial judge stated that there was no emergency about the contempt matter; that it is only where here is a need for "immemediate penal vindication of the dignity of the court" that the court that the court may properly exercise summary powers under Rule 42(a) of the Federal Rules of Criminal Procedure.

2. That this defendant was entitled to have the issues asserted by said judge as contempt of court tried before an impartial judge pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure; that in the instant case, the trial judge not only entered specifications of contempt long after the alleged contumacious acts occurred, but acted as witness and prosecutor without permitting this defendant any hearing and then proceeded to act as a judge and convict this defendant of such charges without due process of law, contrary to the rights of this defendant as preserved to this defendant by the federal statutes and the Constitution of the United States.

3. That one of the items alleged as contumacious consisted of the remarks of Lee A. Freeman on January 26, 1960, almost four months before the trial of the instant case, and in his specifications the presiding judge refers to Freeman's remarks as "charging the Court with bitter, heartless, scornful, insincere and disdainful conduct"; that these remarks disclose that the court is dealing with the alleged contempt as a personal attack upon himself and

he thereby becomes a party involved in the controversy and, as stated by the Supreme Court in the case of *Offutt* v. *United States*, 348 U.S. 11, 13-15:

31 "A judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

Here, unbeknownst to this defendant, Judge Miner was nursing a grievance against trial counsel months before the trial started, and was obviously prejudiced against Parmelee's lawyers; that before the jury was called in, a motion for a change of venue was made before Judge Miner which he summarily denied, and it now appears that at that time Judge Miner knew that he was prejudiced and could not afford the plaintiff a fair trial, and obviously had no right to try this defendant for contempt not only because the alleged contempt represented an alleged attack upon the trial judge, but also because of the prejudice of the trial judge against plaintiff's counsel; that the decisions of the Supreme Court clearly indicate that if speed is not a crucial factor, fundamental fairness and the desirability of maintaining public respect for the judicial office compel the appointment of an impartial tribunal to hear charges of contempt. Thus, the Supreme Court of the United States held in *Offutt* v. *United States*, *supra*, that if a contempt is alleged to have been committed in the presence of the judge and the judge postpones his treatment of the contempt until a later time, he must disqualify himself from presiding at a later contempt hearing.

32 4. That the act of this defendant alleged by the presiding judge to have been contumacious conduct under Specification Number 1 occurred on April 28, 1960, over two months prior to the entry of the instant order. The remark of this defendant set forth in such Specification was not contumacious.

The circumstances under which the remark occurred were these: The court, prior to the impaneling of the jury announced that the trial would be segmented and only the issue of public economic injury would be tried before the jury and then the conspiracy issue and then presumably other issues. This defendant sincerely urged that the public economic injury was an irrelevant isues and that a segmented jury trial was erroneous. We were willing to stand on that position by suggesting a stipulation whereby the first twelve individuals would be impaneled as a jury; we would not offer proof of public economic injury but only proof of conspiracy and request that the court direct a verdict against the plaintiff, Parmelee, as the basis of appeal to the United States Court of Appeals. Weeks of trial and the waste of the time of this court, the jury and counsel would have been avoided. The defendants in the principal case, however, refused to so stipulate but instead insisted upon every procedural technicality required in making an offer of proof of rejected evidence. This defendant proceeded to trial solely with the objective of
33 making a proper record for appeal. When during the course of trial, the judge stated that no matter what jury verdict was returned on the issue of public economic injury, he would still dismiss the action, we again sought to save valuable court time and asked the trial judge to direct a verdict against Parmelee. At no time did this defendant seek to procure a favorable jury verdict by disrespect of the court or disregard of his orders or position. Defendant sought only to make our record for appeal and to protect his client's position.

During the course of plaintiff Parmelee's presentation of proof on the narrow issue to which the court had limited the trial, plaintiff offered a letter from the attorney for defendant Keeshin and Railroad Transfer Service, Inc. to the Mayor of the City of Chicago, in which said attorney

stated as an admission against interest that the proposed transfer service by Keeshin and Railroad Transfer Service, Inc. would be limited in service to the public in various respects in comparison to the then existing comprehensive Parmelee service, and that there was "a wide cleavage" in services of which the public was not generally aware. The trial court sustained objections to the presentation of this letter in evidence and later sustained objections to questions seeking to elicit the facts with respect to those differences in service. This defendant felt that these rulings were in error. The remark contained in Spe-
34 cification Number 1 that "This [the ruling] is crazy" was made by the defendant while conferring with his co-counsel, Mr. McConnell. The remark was not made to the court or in open court, as the record clearly indicates, nor was the remark intended as any disrespect. In fact, the remark was not one that should have been transcribed. Unfortunately, due to the heat of the argument, counsel's voice carried.

Later, after the jury had been dismissed and in discussion with the court, the trial judge indicated his complete understanding of the circumstances under which the above remark was made and the intention of counsel. The following colloquy occurred at pages 929-933 of the trial transcript:

> "By Mr. Thompson: I would just like to say that I appreciate that it is difficult perhaps for counsel for the plaintiff, sitting within three or four feet of the jury, to confer at all without conveying it in such a fashion the jury will overhear it.
>
> "I overheard one of the remarks this afternoon, clear over in my seat, which is twice as far away as the jury is.
>
> "By Mr. Freeman: You don't have to say any more, Mr. Thompson. If I did do that, it was certainly inadvertence, and we will, if there is any con-

ferring, it will be in the lightest whisper. We certainly understand what you suggest is entirely proper.

"By The Court: I think that covers that with the jury and with counsel. • • •

"I said to the jury I am not impressed by those matters. I don't feel offended. It has no impression upon the jury and I want them to disregard everything. I don't want to get into a controversy with either side. • • •

35 "I realize this: It is a very important piece of litigation, important to both sides, and counsel sometimes lose themselves in the heat of passion and say something a little too loud. You have got to be understanding of those matters.

"By Mr. Freeman: You can understand my reaction to the ruling. It was an adverse ruling, and what I was saying was that I thought it was wrong. Of course I did.

"By The Court: I don't blame you for thinking it is wrong. I don't blame either side for disagreeing with me. I am as anxious to make as good and clear a record as I think is proper for the Court of Appeals to review."

36 5. The occurrence specified as number 2 in the contempt order occurred on April 29, 1960, over two months prior to the entry of the instant order and occurred outside of the presence of the jury. This specification sets forth five paragraphs of oral argument in which this defendant commented on the court's ruling as to the admissibility of certain documents in the light of the court's previous memorandum of December 4, 1959. In that memorandum the court had ruled admissible certain documents listed by plaintiff, Parmelee, over the objections of the defendant railroads. In the portion of the oral argument quoted in the contempt order, this defendant was protesting against a series of rulings in which the court had departed from the memorandum where objections to the exhibits had previously been overruled. It was defendant's

right and duty to protest against a series of adverse rulings apparently inconsistent with prior rulings of the court and to inquire what significance was to be accorded the court's earlier memorandum. The language used by this defendant in his oral argument was restrained and deferential. It is regretted that this court now finds the argument offensive, a reaction that was not expressed at the time. As an advocate and as custodian of a client's interest, however, defendant's duty would not permit less to be done were the occasion to arise again.

37 ' 6. Specification number 3 charges generally that during the course of the trial defendant employed "a tone of voice and an attitude indicating contempt and defiance of the Court, by sneering and laughing on occasions when the Court ruled against him and by disregarding admonitions of the Court with respect to his conduct before the jury." Both the record and defendant's recollection are devoid of support of this charge and the charge must be denied categorically. The record is devoid of any references to such conduct either by the court or by opposing counsel, as well as any admonitions by the court to this defendant concerning said conduct to say nothing of a disregard of such admonitions.

7. Specification number 4 has to do with remarks made by this defendant on January 6, 1960, almost six months prior to the entry of the instant order and could only have been dealt with summarily under Rule 42 (a) at that time. The instant order comes too late to be entered as a summary order. Further, during the course of the argument on January 6, 1960 and in a later memorandum of the court on March 10, 1960, commenting upon the argument, no reference is made by the judge to any alleged contempt or disrespect of the judge. It is pertinent in this regard that during the course of argument the presiding judge made the following significant remarks:

a) That a multitude of documents had been held to be inadmissible prior to trial even though the judge had not examined or even seen the documents. On page 53 the court said:

38 "Of course, I have not had a chance to examine the documents. I never purported to make any such statement. They were bulked in thousand lots, and I merely passed upon the propriety and admissibility of these lots in wholesale bundles."

b) That he was not aware of a pretrial hearing before Judge Robson and had not read the transcript of that hearing. On page 66, the following colloquy ocurred:

"By Mr. McConnell: We had a pre-trial hearing on this matter before Judge Robson, as your Honor knows.

"By The Court: No, I don't know.

"By Mr. McConnell: We spent a lot of time there.

"By The Court: I get it now, but I didn't know anything about it.

"By Mr. McConnell: We had a full transcript made of it and arguments pro and con on the different areas of proof.

"By The Court: Was it ever reduced to writing?

"By Mr. McConnell: Yes, it was, and I am going to read now from the transcript.

"By The Court: All right."

c) That while he had ruled inadmissible many documents which were admissions against interest, he would change that ruling and admit them in evidence. In this respect the court's remarks are repeated throughout the transcript and occurred as follows:

"By The Court: I would admit legally and almost in blanket form admissions against interest as admissible.

• • •

"By The Court: In any form and in any shape and manner. The defendant in his own right makes an admission orally or in writing against his interest pertaining to the issues in the case before me, and I would have to be blind or dumb to exclude that from the record.

39 "If any of those are included in there, in passing upon thousands of bundles, you will find probably a good many of them, and I can't predict now or prejudice it, but I am positive that if some individual documents were brought before me and were brought within the confines of the propriety of evidence, why, of course I would admit them." (Page 57)

"By The Court: I will say to you now unequivocally that if any documents are made as admissions against anybody's interest on trial before me, they will go in.

"If I have ruled against them, I never intended to." (Page 65)

d) The court admitted the possible commission of error in the preparation of his pretrial memorandum in view of his failure to have before him any of the documents, as well as the various briefs and arguments made by counsel and admitted that he may have held inadmissible documents to which objections had not been made. He said at pages 61 and 62:

"By The Court: I will check the pleadings again. If I have done you an injustice, I will correct it. There is no question about it, in the light of your argument. I don't want to blanket you out.

• • •

"By The Court: I will plead guilty. If there are documents before me which I included and to which there are no objections, it was an oversight. It was inadvertence or a misunderstanding of the motion before me. Can I go any further than that?"

e) The court at the conclusion of plaintiff's arguments acknowledged the seriousness of the position presented by the plaintiff and sought to justify his position as follows. He said on page 64:

40 "This is all new to me. This whole argument is new to me. When I ruled upon the documents, I merely ruled upon what you have in the confines of your papers, the pleadings there, nothing else."

And then on pages 70 and 71:

"By The Court: I always want to hear you in open court. If I made any mistake, I will correct it, if I made any mistake that was inadvertent or because I didn't understand the isues before me.

"I didn't know that Judge Robson had had a pretrial and gone into all of these matters. I want to check it and find out. It is difficult. • • •

"It is the first time that I know of after twenty years on the bench of throwing to the Judge fourteen bundles of records and documents and saying to him, 'Do you agree to disagree with that area, with that type of proof?'

"It is not intended that the Judge should examine each document and say, 'That belongs in this area and this doesn't.' It is up to you to bring it before me.

"By Mr. McConnell: The law says you can't make a blanket offer of documents. You have to offer them individually.

"By The Court: There is a perfect misunderstanding between you lawyers and not the Court, because the matter came before me on these documents, and I went into them because—exactly as these documents, I thought, required me to do."

7A. That the adjectives used on pages 1 and 2 of the order are conclusory in nature and mere conclusions of fact and do not conform to the requirements as to specifications of facts required by Rule 42 (a) of the Federal Rules of Criminal Procedure. This defendant em-

41 phatically denies the general charge made that he pursued "a course of unprofessional, unethical, intimi-

dating, insulting, defiant, unfair and improper behavior, to foist [his] will upon the Court and jury and to dominate the course of procedure herein without regard to an honest and impartial administration of justice," and respectfully submits that such general charge is without foundation and not supported by specifications in the record as a whole.

8. That this defendant is not only entitled to a trial and a hearing before an impartial judge, but also before a jury under the Fifth and Sixth Amendments of the Constitution of the United States and, if granted such trial, this defendant is prepared to show that he did not, as alleged, embark upon a course of unprofessional or unethical conduct, nor did he attempt to intimidate or insult the presiding judge or to manifest defiance towards the court or to foist his will upon either the court or the jury, nor did he attempt to dominate the course of procedure in the court, but this defendant acted without fear or favor in an attempt to protect the rights of his client in this case and in order to make a record on appeal so that the case could be properly reviewed and the manifest error of the trial court overruled in the Court of Appeals for the Seventh Circuit that this defendant had no other purpose and acted for no other motive.

42 9. That in the contempt order and certificate this court stated that "the acts * * * constituted contumacious conduct of so grave a character as to make imposition of fines insufficient punishment," and this court has sentenced defendant to a ten-day jail sentence as a penalty for each alleged contempt. But in open court the judge announced that such jail sentence would be suspended if this defendant would file a petition of retraction and apology; that this defendant is accused of unethical and unprofessional conduct by such trial judge, which charge is denied and is not supported by any evidence; that this

defendant has practiced law for almost twenty-seven years in this court, in the courts of this state, in other federal courts and in the Supreme Court of the United States, in accordance with the canons of ethics of the legal profession; that the option of apologizing for something of which this defendant is not guilty or of going to jail is an option which only a coward would accept, and it is refused by this defendant without any equivocation whatever; that this defendant's acts and conduct were within the scope of his duty to protect the legal rights of his client and in no instance was there any intent by this defendant to in anywise be disrespectful of the trial judge or reflect upon his authority.

For All Of The Above Reasons, this defendant asks that the order of contempt be vacated as against him and
43 likewise against his co-counsel, Thomas C. McConnell, and that the charges of contempt as made by the presiding Judge be sent to the Executive Committee of this court for assignment for hearing before another judge on issues made, pursuant to the provisions of Rule 42 (b) of the Federal Rules of Criminal Procedure.

Lee A. Freeman
Lee A. Freeman

Lee A. Freeman
105 S. LaSalle Street
Chicago 3, Illinois
An. 3-6939

44

IN THE UNITED STATES DISTRICT COURT

Thursday, July 7, 1960
Present: Honorable Julius J. Hoffman,
District Judge

• • (Caption—No. 56 C 323) • •

Comes Lee A. Freeman and presents his motion to arrest the judgment and order herein of June 30, 1960, and to vacate the same, and for a trial before an impartial judge, and it is

Ordered that said motion be entered and be and hereby is continued before Judge Julius H. Miner.

45

IN THE UNITED STATES DISTRICT COURT

Thursday, July 7, 1960
Present: Honorable Julius H. Miner,
District Judge

• • (Caption—No. 56 C 323) • •

Come Lee A. Freeman and Thomas C. McConnell and present their motions to arrest and vacate the order of contempt and certificate entered against them herein on June 30, 1960 by this Court and for a trial before an impartial judge, and it is

Ordered that said motions be entered and be and hereby are continued to September 15, 1960 at 10 A.M.

45a

United States of America—
Northern District of Illinois—ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby cer-

tify as part of the record on appeal to the United States Court of Appeals, for the Seventh Circuit, in the cause entitled: Parmelee Transportation Company, Plaintiff vs. John L. Keeshin, *et al.*, Defendants, No. 56 C 323, (In the Matter of the Criminal Contempt of Thomas C. McConnell and Lee A. Freeman, the following, to wit:

Clerk's filed copy of the transcript of proceedings had before the Honorable Julius H. Miner, Judge and filed by the Official Court Reporter, *viz*:

Transcript of July 7, 1960, filed September 30, 1960 and Transcript of September 15, 1960, filed October 27, 1960.

filed among the records of the said court in my office on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid (Seal) Court at Chicago, Illinois, this 28th day of October, 1960.

Roy H. Johnson
Clerk
By Gizella Butcher
Deputy Clerk

1

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

TRANSCRIPT OF PROCEEDINGS
(Filed September 30, 1960)

had in the above-entitled cause before the Honorable Julius H. Miner, one of the Judges of said Court, in his court room in the United States Court House, Chicago, Illinois, on Thursday, July 7, 1960, at the hour of 10:30 o'clock a.m.

Present:

Mr. Lee A. Freeman, (Suite 514, 105 South LaSalle Street, Chicago 3, Illinois),

Mr. Thomas C. McConnell, and
Mr. Francis J. McConnell, (Suite 1110, 134 South LaSalle Street, Chicago 3, Illinois)

Hon. Robert Tieken, United States Attorney (United States Court House, Chicago, Illinois)

Mr. John P. Lulinski, Assistant United States Attorney (United States Court House, Chicago, Illinois)

Mr. Thomas James, Assistant District Attorney (United States Court House, Chicago, Illinois)

2 The Clerk: 56 C 323, Parmelee Transportation Company against John L. Keeshin, *et al.*, motion to arrest judgment and order of June 30, 1960, and to vacate the same and for a trial before an impartial judge.

Mr. James: Good morning, your Honor. The United States Attorney was served with notice in this matter. We believed, as a courtesy to the Court, that we should respond before Judge Hoffman this morning. However, we do not believe that we are a proper person to be served at this time.

Before Judge Hoffman we stated that we believed that this should be transferred immediately to your Honor for such disposition as you would care to make.

The Court: I will hear it.

Mr. James: I don't know. At this time the United States Attorney is not prepared to argue any of the points of this motion.

The Court: I will give you time. There won't be any problem on that. What is your pleasure, counsel?

Mr. Thomas McConnell: Well, it is your Honor's pleasure.

The Court: Pardon?

Mr. Thomas McConnell: I say, it is your Honor's pleasure.

3 The Court: I have read the petition. Do you want to be heard now?

Mr. Tieken: We are not in this matter, if the Court please. If the Court wishes the government to represent the Court in this matter—

The Court: I will ask you to represent the Court.

Mr. Tieken: We would then like to have time within which to familiarize ourselves with the petition and with the order on which it was based.

Mr. Thomas McConnell: May I say this, if your Honor please: The reason that this motion is filed at this time is that when we examined your Honor's order, we came to the conclusion that the mere stay or suspension of the sentence did not protect us from the running of the time on appeal and that the only way that that could be brought over until the September 15th date which your Honor mentioned—

The Court: Well, I told you then, and I meant it and I will tell you now, and I mean it, I want to protect your rights. There is no problem.

Mr. Thomas McConnell: That is the only thing we are trying to do.

The Court: There is no technicality on that. I wanted to protect the record. I wanted to protect you and protect the Court. There is no emergency about it. I say to you

4 now, if you have any kind of an order that you wish to enter to protect your rights on appeal, or any other rights you have, I will enter it.

Mr. Thomas McConnell: That's all we have to say on that.

Now, on the other, I want to say this: Both Mr. Freeman and myself have given very, very serious consideration to

this, as your Honor knows. This is a very serious matter, so far as we are concerned.

The Court: I know that.

Mr. Thomas McConnell: I practised law in this Court for thirty-six years; Mr. Freeman has practised twenty-five. We want to say—and we have said it in our motion and we want to say now that never, either by thought, deed or act have we intended to attack your Honor.

Now, I can realize that in the heat of argument here and in the way words are phrased in some instances that your Honor could gain that impression, but never at any time have we meant to attack your Honor's integrity or your Honor's handling of the case except that we have felt—we felt in the trial and we feel now—that we had to make a record for review here. We have felt honestly, as lawyers, that to do that, we had to take certain steps.

Now it may very well be that in the heat of this case that Mr. Freeman and myself raised our voices or did something of that kind which gave your Honor the wrong impression. Certainly, we are perfectly willing to apologize and we want to retract any statement which would charge your Honor with anything in the way of lack of integrity or the handling of this matter. The only thing is, we are placed in this position and we state this in our motion; that in the general language in the charge, we are charged with unprofessional and unethical conduct and we feel and we feel very seriously that to apoligize certainly puts us in a position where we admit lack of integrity before this Court, which we do not feel is justified and we feel we have a right to defend against.

So far as any personalities, so far as any personal feeling toward your Honor, neither of us have any feeling of that kind at all and never have had. All we have tried to do in this case is to properly represent our client.

Now your Honor has had enough experience to know that in a bitterly contested litigation like this, we are dealing with hostile counsel on one side in the Court. We are dealing with it as the thing develops, in the course of the proceedings. We are dealing with it the best we can. We are both experienced lawyers but we can make mistakes, too. But, the mistakes which were made were not mis-
6 takes that were intended for the purpose of attacking your Honor.

That's all I want to make clear to your Honor.

The Court: I have said to you at the outset that I have no ill-feeling. It was the matter of the integrity of the Court that I wanted to protect. Believe me, there is nothing personal in it.

Mr. Thomas McConnell: There was no attack made on this Court and never has been.

The Court: From the words that you have used and the statements that are shown in the record, there isn't any question but that you have exceeded every reasonable limitation in the trial of the case, but I still, certainly, have no malice in my heart, I never did in my life. I have been on the bench twenty-three years and I have never done this before.

There is one thing one must do—protect the record. Over the objections of the defense counsel, I think that all the way down the line I have let you make your record completely. There is not a scintilla of evidence, not a statement that will indicate you have been curtailed in any way in the making of your offer of proof. Isn't that right?

Mr. Thomas McConnell: Well, we have made our offers of proof.

The Court: Completely.

7 Mr. Thomas McConnell: We felt then and we do feel now that in the heat of the trial we had to take certain steps to protect our rights. That's all we are trying to do.

The Court: All right. I want you to protect the record on appeal. Let me give it some thought. I accept your statement in good faith, there is no question about it.

Mr. James: Your Honor, since you have requested the government to represent you in this matter, we would like thirty days within which to answer this motion.

The Court: Let me finish this, counsel. I want to protect them on the record.

I don't want to do anything that will in any way be interpreted or accepted by the Court of Appeals as a limitation on your time. I want the record to show that.

Suppose we enter a motion to vacate? That will protect you.

Mr. Thomas McConnell: Yes. That is the motion.

The Court: Pardon?

Mr. Thomas McConnell: That is the motion we presented.

The Court: All right. I will enter your motion.

Mr. Thomas McConnell: I think we are protected now.

8 The Court: I will enter your motion to vacate.

Mr. Freeman: Would you make it two motions, your Honor? We have filed two motions, your Honor.

The Court: That is all right. I want to protect you. I want to consider it.

I would much prefer, when you file your petition, that you state a retraction and apology. I will help you in every way I can, believe me. I don't want any hardship upon either of you. It is with great reluctance that I have done what I have done. I do not penalize lawyers unduly. I don't want to punish them unnecessarily and harshly. It has never been my practise and it will not be in this case, but I think the most insulting remarks, the most abusive words used are on the record and I pointed them out to you.

The Court resented it, as I told you at the time. This is not new. I told you when the remarks were made that I was going to hold you in direct contempt. The record so shows.

Your petition alleging undue delay hasn't any real merit to it, but with the assurance I have given you, I will enter the two motions, the one to vacate and this motion, a separate motion to vacate the entire order, and I will continue it until the same day we set before.

Mr. Freeman: September 15th.

9 The Court: And then you can answer this petition if you wish. I don't think you have to. You can talk to counsel if you want to. What was the date—September 15th?

Mr. Freeman: September 15th.

The Court: The motion will be entered to vacate the order as of June 30th.

Mr. Freeman: The order of June 30th.

The Court: Continue it, also. That will protect you for any purpose, every purpose.

Mr. James: We would like thirty days within which to answer or otherwise plead.

The Court: I would rather not have you answer it, in the light of counsel's statement. It may be a narrow exchange of views. Maybe we would rather avoid more pleadings if we come to some sensible, fair understanding.

10 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

CERTIFICATE

I Hereby Certify that the proceedings had at the hearing of the above-entitled cause before the Hon. Julius H. Miner, on Thursday, July 7, 1960, were reported by me in short-

hand and that the foregoing transcript consisting of pages 1 to 9, inclusive, is a true, correct and complete transcript of my original shorthand notes so taken as aforesaid.

Kay Siboit
Official Reporter, United States District Court, Northern District of Illinois, Eastern Division.

1

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

TRANSCRIPT OF PROCEEDINGS
(filed Oct 7 1960)

had in the above-entitled cause before the Honorable Julius H. Miner, one of the Judges of said Court, in his court room in the United States Court House, Chicago, Illinois, on Thursday, September 15, 1960, at the hour of 10:00 o'clock a.m.

Present:

Mr. Lee A. Freeman (Suite 514, 105 South LaSalle Street, Chicago 3, Illinois)

Mr. Thomas C. McCornell, and
Mr. Francis J. McConnell, (Suite 1110, 134 South LaSalle Street, (Chicago 3, Illinois)

Mr. Robert Tieken, United States Attorney (United States Court House, Chicago, Illinois)

Mr. John P. Lulinski, Assistant United States Attorney (United States Court House, Chicago, Illinois)

2 The Clerk: 56 C 323, Parmelee Transportation Company vs. John L. Keeshin, *et al.*, motion of Lee A. Freeman and Thomas C. McConnell to arrest and vacate the order of contempt and certificate entered against them herein

on June 30, 1960 by Judge Julius H. Miner and for a trial before an impartial judge.

Mr. Freeman: Good morning.

The Court: Good morning.

Mr. McConnell: We are submitting that motion on the papers in support of it.

The Court: All right. I am sorry that you have chosen that course. I have told you several times that I would much prefer the other course, with retraction and apology, with the assurance that I would vacate the entire order, but, if that is your position, I will sign the order.

Mr. McConnell: We feel, your Honor, that we can't admit things that—

The Court: I have mentioned several times that I would prefer the other course of leniency. I have no choice but to sign the order overruling your petition and vacating any motion. You can sign your own recognisance.

Mr. McConnell: We would like, if the Court please, and we have, under the statute, ten days to file our notice to appeal. We would like, if we may have it, a ten-day stay to get our bond on file.

The Court: You can sign your own recognisance. You can have ten days on your own recognisance and you can perfect it in ten days or twenty days.

Mr. McConnell: Thank you very much. We will bring our orders in.

The Court: Ten days stay to perfect the appeal. Do you see any objection, Mr. Tieken, Mr. Lulinski?

Mr. Tieken: No.

Mr. Freeman: What is the amount of the recognisance?

The Court: $100.00.

Mr. Freeman: Shall we file a motion in support of our stay?

The Court: What?

Mr. Freeman: I wonder if you would want us to file written motions in support of a stay of execution.

The Court: No. It is not a technical proceedings.

Mr. Freeman: Thank you.

(Thereupon the Court gave attention to another matter on the call, after which the further proceedings were had herein:)

The Court: Do you want to file something, Mr. Freeman?

Mr. Freeman: Your Honor, I am submitting draft
4 orders that I believe state what you said. One is a stay of execution of sentence, ten days. The other is a recognisance bond for $$100.00. There are four papers, two for me and two for Mr. McConnell.

The Court: All right.

(Which were all of the proceedings had and taken in the above entitled cause on said date.)

5 IN THE UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

CERTIFICATE

I Hereby Certify that the proceedings had at the hearing of the above-entitled cause before the Hon. Julius H. Miner, on Thursday, September 15, 1960, were reported by me in shorthand and that the foregoing transcript consisting of pages 1 to 4, inclusive, is a true, correct and complete transcript of my original shorthand notes so taken as aforesaid.

Kay Siboit
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

46

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

ORDER

This cause comes on for hearing on two motions to arrest the judgment and order of June 30, 1960, to vacate the said judgment and order and for trial before an impartial judge made and filed respectively by the defendants Lee A. Freeman and Thomas C. McConnell.

The Court has given lengthy and due consideration to all aspects of these motions and after careful study and reflection and extensive examination is ready to rule thereon. Preliminarily, however, the Court reemphasizes the proffered disposition of this cause upon written retraction and apology by each of the named defendants to the Court. This proffered disposition, including vacating of the order of June 30, 1960, has been refused by each of the defendants.

47 Now, therefore, in consideration of all and singular of the above and foregoing

It is hereby ordered and adjudged that each of the motions to arrest the judgment and order of June 30, 1960, to vacate the said judgment and order of June 30, 1960, and for trial before an impartial judge made and filed respectively by the defendants Lee A. Freeman and Thomas C. McConnell be and the same are hereby denied.

It is Further Ordered And Adjudged that Order of June 30, 1960 forthwith be executed.

Enter: *J. H. Miner*
United States District Judge

Sep. 15, 1960

48

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

ORDER

It Is Hereby Ordered that execution of the sentences heretofore imposed upon Thomas C. McConnell in the above-entitled cause be and the same is hereby stayed for a period of ten (10) days from the date hereof, pending his filing of Notice of Appeal herein.

Enter:

/s/ *J. H. Miner*
JUDGE

Dated: September 15, 1960

49

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

ORDER

On motion of Thomas C. McConnell, pursuant to Rule 46(a)(2) of the Rules of Criminal Procedure, for an order fixing bail pending appeal from the Contempt Order and Certificate, and sentences thereon, entered against him on June 30, 1960,

It Is Hereby Ordered that the said Thomas C. McConnell be set at liberty upon furnishing personal bond without surety in the sum of One Hundred Dollars ($100.00) during the pendency of said appeal in the Court of Appeals for the Seventh Circuit and until the mandate of said Circuit Court shall be issued and filed on said appeal and an order entered thereon.

Enter:

/s/ *J. H. Miner*
JUDGE

Dated: September 15, 1960

50

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

ORDER

It Is Hereby Ordered that execution of the sentences heretofore imposed upon Lee A. Freeman in the above-entitled cause be and the same is hereby stayed for a period of ten (10) days from the date hereof, pending his filing of Notice of Appeal herein.

Enter:

/s/ *J. H. Miner*
JUDGE

Dated: September 15, 1960

51

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 56 C 322)

ORDER

On motion of Lee A. Freeman, pursuant to Rule 46(a)(2) of the Rules of Criminal Procedure, for an order fixing bail pending appeal from the Contempt Order and Certificate, and sentences thereon, entered against him on June 30, 1960,

It Is Hereby Ordered that the said Lee A. Freeman be set at liberty upon furnishing personal bond without surety in the sum of One Hundred Dollars ($100.00) during the pendency of said appeal in the Court of Appeals for the Seventh Circuit and until the mandate of said Circuit Court shall be issued and filed on said appeal and an order entered thereon.

Enter:

/s/ *J. H. Miner*
JUDGE

Dated: September 15, 1960

52

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

NOTICE OF APPEAL
(Filed September 21, 1960)

Name and address of appellant: Thomas C. McConnell, 523 Sheridan Road, Kenilworth, Illinois.

Name and address of appellant's attorney: Thomas C. McConnell, pro se, and Francis J. McConnell; McConnell, Paschen & Curtis, 134 South LaSalle Street, Chicago 3, Illinois.

Offense: Criminal Contempt.

Concise statement of judgment or order, giving date and any sentence: On June 30, 1960, the Honorable Julius H. Miner, Judge of said District Court, entered a contempt order and certificate, adjudging appellant in direct contempt and sentencing him to confinement for a period of

53 ten (10) days on each of three specifications described in said contempt order and certificate, said sentences to run concurrently. On July 7, 1960 appellant filed a motion to arrest judgment and order of June 30, 1960, and to vacate the same and for a trial before an impartial judge, which motion was denied on September 15, 1960.

Name of institution where now confined, if not on bail: Appellant was admitted to bail by order of court dated September 15, 1960.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the above-stated contempt order and certificate, and sentences thereon.

Dated: Stepember 20, 1960.

Thomas C. McConnell
Thomas C. McConnell, *pro se*
Francis J. McConnell
Francis J. McConnell,
Attorney for Thomas C. McConnell

McConnell, Paschen & Curtis,
134 South LaSalle Street, #1110,
Chicago 3, Illinois
RAndolph 6-9131

54 United States of America,
Northern District of Illinois—ss:

• • (Caption—No. 56 C 323) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 21, 1960 in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, and Federal Rules of Criminal Procedure a copy of the foregoing Notice of Appeal was mailed to:

Honorable Kenneth J. Carrick, Clerk
United States Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

Honorable R. Tieken, United States Attorney
450 United States Court House
Chicago 4, Illinois

Attention: John Peter Lulinski, Chief Appellate Division

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 21st day of September, 1960.

Roy H. Johnson
Clerk

By Gizella Butcher
Deputy Clerk

(SEAL)

55

UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

STATEMENT PURSUANT TO RULE 12(d)
(Filed October 5, 1960)

1. The name of the appellee is:
United States of America

2. Counsel for the appellee are:
R. Tieken, United States Attorney
Room 450 U.S. Courthouse, Chicago 4, Illinois

John Peter Lulinski
Charles R. Purcell, Jr.,
Assistant United States Attorneys,
Room 450 U.S. Courthouse, Chicago 4, Illinois

Respectfully submitted,
R. Tieken
R. Tieken
United States Attorney

JPL:ak

56

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

NOTICE OF APPEAL

(Filed September 21, 1960)

Name and address of appellant: Lee A. Freeman, 375 Palos Road, Glencoe, Illinois.

Name and address of appellant's attorney: Lee A. Freeman, pro se, 105 South LaSalle Street, Chicago, Illinois, and Brainerd Currie, University of Chicago, Law School, Chicago, Illinois.

Offense: Criminal contempt.

Concise statement of judgment or order, giving date and any sentence: On June 30, 1960, the Honorable Julius H. Miner, Judge of the said District Court, entered a con-
57 tempt order and certificate, adjudging appellant in direct contempt and sentencing him to confinement for a period of ten (10) days on each of four specifications described in said contempt order and certificate, said sentence to run concurrently. On September 15, 1960, the Honorable Julius H. Miner entered an order denying a motion filed by appellant on July 7, 1960, to vacate said contempt order and arrest judgment.

Name of institution where now confined, if not on bail: Appellant was admitted to bail by order of court dated September 15, 1960.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the above-stated contempt order and certificate, and sentences thereon.

Dated: September 21, 1960.

Lee A. Freeman
Lee A. Freeman, *pro se*
Brainerd Currie
Brainerd Currie
Attorney for Lee A. Freeman

Lee A. Freeman
105 S. LaSalle Street
Chicago, Illinois
An. 3-6939

Brainerd Currie
University of Chicago
Law School
Chicago, Illinois
Mi. 3-0800

58 United States of America,
Northern District of Illinois—ss:

(Caption—No. 56 C 323)

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 21, 1960 in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, and Federal Rules of Criminal Procedure a copy of the foregoing Notice of Appeal was mailed to:

Honorable Kenneth J. Carrick, Clerk
United States Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

Honorable R. Tieken, United States Attorney
450 United States Court House
Chicago 4, Illinois

Attention: John Peter Lulinski, Chief Appellate Division

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 21st day of September, 1960.

Roy H. Johnson
Clerk

By *Gizella Butcher*
Deputy Clerk

(SEAL)

59

UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

STATEMENT PURSUANT TO RULE 12(d)
(Filed October 5, 1960)

1. The name of the appellee is:
United States of America

2. Counsel for the appellee are:
R. Tieken, United States Attorney
Room 450 U.S. Courthouse, Chicago 4, Illinois
John Peter Lulinski,
Charles R. Purcell, Jr.,
Assistant United States Attorneys,
Room 450 U.S. Courthouse, Chicago 4, Illinois

Respectfully submitted,
R. Tieken
R. Tieken
United States Attorney

JPL:ak

60

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

STIPULATION AS TO RECORD ON APPEAL

(Filed October 21, 1960

The parties hereto, by their respective attorneys, stipulate and agree that the record on appeal to the United States Court of Appeals for the Seventh Circuit from the Contempt Order and Certificate entered herein on June 30, 1960, against Thomas C. McConnell, shall include and be constituted of the portion of the record, proceedings and evidence in the case as set forth below:

1. Record on appeal in Parmelee Transportation Company, Plaintiff-Appellant, v. John L. Keeshin, et al.,
61 Defendants-Appellees, before the United States Court of Appeals for the Seventh Circuit, Docket Number 13160.
2. Statement required by Rule 12(c) of the United States Court of Appeals for the Seventh Circuit.
3. Minute Order of June 30, 1960.
4. Contempt Order and Certificate entered June 30, 1960.
5. Motion of Thomas C. McConnell to Arrest Judgment and Order of June 30, 1960, and to Vacate the Same and for Trial Before an Impartial Judge, filed July 7, 1960.
6. Minute Order of July 7, 1960, entering Motion of Thomas C. McConnell to Arrest Judgment and Continuing Same to September 15, 1960.
7. Order of September 15, 1960, denying Motion to Arrest Judgment.
8. Motion of Thomas C. McConnell to Stay Execution of Sentences for Ten Days Pending Filing Notices

of Appeal and to Fix Bond, filed September 15, 1960.

9. Minute Order of September 15, 1960, staying execution of sentences for ten days and fixing bond at $100.
10. Notice of Appeal, filed by Thomas C. McConnell on September 21, 1960.
11. Bond of Thomas C. McConnell, filed September 21, 1960.
12. Transcript of Proceedings before Judge Miner on July 7, 1960, and September 15, 1960.

62 13. Certified copy of docket entries commencing May 10, 1960.

14. This Stipulation.

Dated: October 21, 1960.

Thomas C. McConnell
Thomas C. McConnell, *pro se*
Francis J. McConnell
Francis J. McConnell
Attorney for
Thomas C. McConnell

Robert Tieken
Robert Tieken
United States Attorney

McConnell, Paschen & Curtis
134 South LaSalle Street, #1110
Chicago 3, Illinois
RAndolph 6-9131

63

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

STIPULATION AS TO RECORD ON APPEAL

(Filed October 21, 1960)

The parties hereto, by their respective attorneys, stipulate and agree that the record on appeal to the United States Court of Appeals for the Seventh Circuit for the Contempt Order and Certificate entered herein on June 30, 1960, against Lee A. Freeman, shall include and be constituted of the portion of the record, proceedings and evidence in the case as set forth below:

1. Record on appeal in Parmelee Transportation Company, Plaintiff-Appellant v. John L. Keeshin, et al., Defendants-Appellees, before the United States Court of Appeals for the Seventh Circuit, Docket Number 13160.

64 2. Statement required by Rule 12(c) of the United States Court of Appeals for the Seventh Circuit.

3. Minute Order of June 30, 1960.

4. Contempt Order and Certificate entered June 30, 1960.

5. Motion of Lee A. Freeman to Arrest Judgment and Order of June 30, 1960, and to Vacate the Same and for Trial before an Impartial Judge, filed July 7, 1960.

6. Minute Order of July 7, 1960, entering Motion of Lee A. Freeman to Arrest Judgment and Continuing Same to September 15, 1960.

7. Order of September 15, 1960, denying Motion to Arrest Judgment.

8. Motion of Lee A. Freeman to Stay Execution of Sentences for Ten Days Pending Filing Notices of Appeal and to Fix Bond, filed September 16, 1960.

9. Minute Order of September 15, 1960, staying execution of sentences for ten days and fixing bond at $100.
10. Notice of Appeal filed by Lee A. Freeman on September 21, 1960.
11. Bond of Lee A. Freeman, filed September 21, 1960.
12. Transcript of proceedings before Judge Miner on July 7, 1960 and September 15, 1960.

65 13. Certified copy of docket entries commencing May 10, 1960.

14. This Stipulation.

Dated: October 21, 1960.

Lee A. Freeman
Lee A. Freeman, *pro se*
Brainerd Currie
Brainerd Currie
Attorney for Lee A. Freeman

Robert Tieken
Robert Tieken
United States Attorney

Lee A. Freeman
105 South LaSalle Street
Chicago, Illinois
An. 3-6939

Brainerd Currie
University of Chicago
Law School
Chicago, Illinois
Mi. 3-0800

66 United States of America,
Northern District of Illinois—ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby

certify that the above and foregoing are the original papers constituting the record on appeal in the contempt proceedings, in the cause entitled: Parmelee Transportation Company, Plaintiffs, vs. John L. Keeshin, et al., defendants, No. 56 C 323, In the Matter of Criminal Contempt of Thomas C. McConnell and Lee A. Freeman, as follows:

Two orders entered June 30, 1960 and
Contempt order and certificate entered June 30, 1960
Motion of Thomas C. McConnell, to arrest judgment and order of June 30, 1960, and to vacate the same and for a trial before an impartial judge, filed July 7, 1960.
Order entered July 7, 1960.
Motion of Lee A. Freeman to arrest judgment and order of June 30, 1960, and to vacate the same and for a trial before an impartial judge, filed July 7, 1960.
Order entered July 7, 1960.
Order entered July 7, 1960, re motions of Thomas C. McConnell and Lee A. Freeman.
Five orders entered September 15, 1960.
Notice of appeal of Thomas C. McConnell, filed September 21, 1960.
Clerk's certificate of mailing attached thereto.
Statement pursuant to Rule 12(d) filed October 5, 1960.

67 Notice of appeal of Lee A. Freeman, filed September 21, 1960.
Clerk's certificate of mailing attached thereto.
Statement pursuant to Rule 12(d) filed October 5, 1960.
Stipulation as to record on appeal, filed October 21, 1960, respectively of Thomas C. McConnell and Lee A. Freeman.

filed and entered among the records of the said Court in my office on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 28th day of October, 1960.

Roy H. Johnson
Clerk
By *Gizella Butcher*
Deputy Clerk

(SEAL)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, November 23, 1960

Before
Hon. Win G. Knoch, Circuit Judge

PARMELEE TRANSPORTATION Co., etc.,
Plaintiff-Appellant,
No. 13160 vs.
JOHN L. KEESHIN, et al.,
Defendants-Appellees;

PARMELLEE TRANSPORTATION COMPANY,
Plaintiff,
vs.
JOHN L. KEESHIN, et al.,
Defendants

No. 13175
In the Matter of Criminal Contempt of Thomas C. McConnell
No. 13176
In the Matter of Criminal Contempt of Lee A. Freeman

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the separate motions of Thomas C. McConnell, appellant in appeal No. 13175 and Lee A. Freeman, appellant in appeal No. 13176, and the separate answers of counsel for appellee, United States of America, to said motions,

It Is Hereby Ordered that the separate motions of the appellants be granted; and

It Is Ordered that the printed appendix to be filed by plaintiff-appellant in appeal No. 13160 stand and constitute part of the printed appendix to be filed by the appellants in appeals Nos. 13175 and 13176, and that the time for filing the printed brief and appendix of the appellants in appeals Nos. 13175 and 13176 be extended to and including January 3, 1961.

It Is Further Ordered that 50 copies of the printed appendix to be filed by plaintiff-appellant in appeal No. 13160 be filed instead of the 30 printed copies as provided in the Rules of this Court.

[fol. 58]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13175

September Term, 1960—April Session, 1961

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

PARMELEE TRANSPORTATION COMPANY, a Delaware corporation, Plaintiff,

v.

JOHN L. KEESHIN, et al., Defendants.

In the matter of criminal contempt of

THOMAS C. McCONNELL, Respondent-Appellant.

OPINION—July 6, 1961

Before Duffy, Schnackenberg and Castle, Circuit Judges.

Schnackenberg, Circuit Judge. Thomas C. McConnell, respondent, has appealed from an order of the district court entered by Judge Julius H. Miner thereof, on June 30, 1960, adjudging him guilty of criminal contempt and sentencing him to confinement for a period of ten days on each of three specifications described in said contempt order, said sentences to run concurrently. The alleged acts of contempt occurred in connection with the trial of the case of *Parmelee* v. *Keeshin, et al.*[1]

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[1] An appeal in this case was decided in this court, as case No. 13160, on June 30, 1961.

1. *Specification 5 reads as follows:*

> "On April 21, 1960, prior to the selection of a jury, although Thomas C. McConnell, by his own statement, [fol. 59] had read the transcript of the previous hearing in the cause at which the Court of its own motion suggested that consideration be given to separation of the issue of public injury for trial, and although no such suggestion or motion had been made by any attorney for any defendant at any hearing in the case, Mr. McConnell stated as follows:
>
> > "'This should be a forum where we could have that lawsuit tried without being hemmed in and penned in with a lot of artificial restrictions, dreamed up by counsel on the other side, whereby we are not given an opportunity to tell this jury what this lawsuit is about.'"

Respondent contends that he did not take the position that the court had no right to divide issues "under Rule 21," but that the issue the court proposed to segregate for trial was irrelevant. This position of respondent is supported by *Radiant Burners* v. *Peoples Gas Co.*, 364 U.S. 656, 660. In fact, Judge Miner, at the end of the case, seems to have conceded that McConnell was not arguing the power of the court to separate legitimate issues for trial, when the judge said:

> "• • • Plaintiff opposed the separation on legal grounds, arguing that it was unnecessary for plaintiff to prove public injury as such; • • • "

Nevertheless the court then said that he had read the briefs and the pleadings and that plaintiff made a specific allegation of public injury, which the defendants denied, and hence it was prerequisite that it be established.

We find it most difficult, if not impossible, to read into anything referred to in specification 5 any contumacious conduct by respondent. While no defense attorney had made a suggestion or motion for separation of the issue of public injury for trial, the court had indicated that

from reading the briefs and pleadings, the defendants had made a special denial of public injury and "that makes a prerequisite its establishment before we can go on with the others, the right to recover." In view of the correct contention of respondent that public injury was not a relevant issue, it is evident from the charge in specification 5 that respondent was referring to the arguments in the briefs and pleadings of defendants and that he had sub-[fol. 60] stantial basis for the language which he used, in view of the Supreme Court holding in *Radiant Burners, supra,* as well as *Radovich* v. *National Football League,* 352 U.S. 445, 453.

We hold that, on the record before this court, specification 5 does not validly charge respondent with contempt of court.

Specification 6 reads as follows:

> "On April 27, 1960, in the presence and hearing of the jury, after the Court had instructed the attorneys for plaintiff to refrain from repeatedly asking questions on subjects which the Court had ruled was not admissible, in the presence of the jury as distinguished from an offer of proof outside the presence of the jury, the following occurred:
>
> 'By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it.
>
> 'By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case.
>
> 'By Mr. McConnell: We have a right to ask them.
>
> 'By the Court: You can offer proof on it.
>
> 'By Mr. McConnell: We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.'"

As indicated in our opinion in No. 13160, the case of *Parmelee* v. *Keeshin, et al.*, was on trial before court and jury when respondent proposed to make offers of proof outside the presence of the jury. Upon defendants' rejection of plaintiff's suggestion, the court ordered the trial to proceed. Respondent stated that the offers would involve proof of the conspiracy and monopoly issues, which [fol. 61] he was advised "will have to be made outside the presence of the jury". The court responded: "That is correct. That is my ruling."

Respondent explained that he was simply laying a basis in the record for an appeal and that he wished to have the record show the offers that he was making.

He attempted to follow the usual procedure, which consists of putting a question to a witness in the presence of the jury and, when an objection is made, an offer of proof is made out of the presence of the jury.[2] Finally the court admitted that this procedure followed by respondent was required by "the cases" as he "read them". However, later the court struck from the record several offers of proof bearing upon the charges of conspiracy and monopoly, for the reason that these charges had nothing to do with the question of public injury.

It is obvious that respondent, although with difficulty, was maintaining his client's position, despite the shift in the court's rulings as to the submission of offers of proof in a jury case. The method that respondent followed is in accord with the long-established practice in Anglo-Saxon courts and this incident emphasizes the great importance of trial court experience for lawyers generally. Ironically, respondent's adherence to what he had learned in this respect in the courts led to his being ordered to jail. Fundamentally there is no adequate substitute in the heat of a contested trial for prior trial experience. Of course in these days, when more money can be made by lawyers outside of courtrooms, the number of experienced trial lawyers is rapidly decreasing. So, to supply a synthetic experience in capsule form to take the place of trial experience, we have rules of court, such as 28 U.S.C.A. Rule 43 (c), *supra*,

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[2] This procedure is recognized by 28 U.S.C.A. Rule 43(c).

just as we have vitamin pills as a substitute for meals which always have taken considerable time in preparation as well as in eating. So, now, without trial experience, or the expenditure of time to learn why it is so, the modern lawyer may simply read the rules of civil procedure and practice according to the rule book. If there is any area of trial court practice which is not now covered by the rules, it is probable that a new rule will be promulgated in due time. [fol. 62] We have attempted to reproduce the essence of the turbulence under which respondent was required to act in protecting his client's rights. It is not the purpose of this opinion to decide whether he was correct in his statement of the substantial rights of his client. We are here concerned with the question of whether respondent as an attorney conducted himself properly in an attempt to represent his client. It was his right as well as his duty to firmly and respectfully advance plaintiff's claims and assert its rights. In so doing, he had as much right to be in the courtroom and to act as did the judge. He had a right, when the court ruled that he could not introduce evidence, to make offers of proof thereof, to the end that, in case of an appeal, a proper basis for a review might appear in the record. The presiding judge had a right to punish respondent for any contumacious violation of his duty as a member of the bar in this proceeding. Power to punish for contempt is one which must be used sparingly and only when it is clearly demonstrated that the respondent's conduct is contumacious and tends to bring the administration of justice into disrepute, rather than when his conduct is that of a determined level-headed practitioner who is acting respectfully to the court under considerable pressure in a lengthy and important trial.

18 U.S.C.A. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> • • • • • • •

In *Ex parte Hudgings*, 249 U.S. 378, 383, the court said:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—
>
> • • • • • • •"

[fol. 63] This case was cited with approval in *In re Michael*, 326 U.S. 224, 228.

In the case at bar the order from which the appeal was taken contains no finding that respondent's conduct tended to obstruct or continued to obstruct the administration of justice, although we do not base our decision on this omission. Rather we think that its absence strongly indicated that the district court could find no support in the record for such a statement. Actually it appears that the specifications upon which the order was based were not made until several weeks after the trial in question had occurred.

As to specification 6, we hold that, with the exception of one statement attributed to respondent, nothing with which he is charged has been supported by proof of contumaciousness or disrespect.

The exception in specification 6, to which we have just referred, charges that respondent said:

> "• • • We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us."

The whole theory for holding respondent immune from his conduct in representing his client in good faith is satisfied when he is permitted to make a record in a respectful manner in the trial court for use in a court of review. The theory rests on the premise that he needs no further protection than an adequate record and that, if the court infringes his right to make such a record, his redress is in the court of review. His language which we now quote indicates that he did not rely alone upon this protection

but that he took the position that he intended to physically defy the court to the point that only a superior physical force called upon by the court could prevent him from proceeding. Even if he was right in his method of making a record and the court was wrong, this threat was inexcusable contumacious conduct. While events did not precipitate a physical clash, respondent made it clear when he uttered these words that he proposed to insist upon pursuing his course of action until stopped by a court bailiff. This proof is enough to support specification 6 and to that extent will require an affirmance of the order from which this appeal has been taken. We shall, however, [fol. 64] reduce the punishment thereunder to a fine of $100.

Specification 7 reads:

> "Repeatedly during the course of the trial Thomas C. McConnell conducted himself in a contumacious manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court and disregarding admonitions of the Court with respect to his conduct before the jury."

This specification, without citation of any part of the record to support it, is too general to require an answer by respondent or a definitive ruling by this court. If the law were otherwise, we would be required to determine whether the order was justified without being directed to a single fact, word or deed alleged to have been spoken or performed by the accused. As one court said in regard to such a charge:

> " * * * The conclusions of the judge, unsupported by specific facts, in a direct contempt proceeding bear no weight whatsoever."

People v. *Hassakis*, 6 Ill. 2d 463, 129 N.E. 2d 9, 11. To the same effect are cases summarized in 154 A.L.R. 1227.

We find nothing cited in a brief filed by the United States attorney in support of the contempt orders which justifies specification 7. In fact, that brief seeks shelter in the argument that, inasmuch as concurrent sentences

were imposed on each of several specifications, the upholding of an order on any one is sufficient.

We hold that specification 7 does not constitute contempt as a matter of law since it recites mere conclusions and no facts on which the alleged contempt is based.

2. Respondent contends that fundamental fairness required that Judge Miner disqualify himself from acting in the contempt matter. This, he says, is because Judge Miner considered the alleged contempts as a personal attack upon himself, and, at the same time, he conceded that there was "no emergency about it."

Respondent relies particularly upon *Offutt* v. *United States*, 348 U.S. 11; *In re Murchison*, 349 U.S. 133; and *Farese* v. *United States*, 1 Cir., 209 F.2d 312, 315.

[fol. 65] It is a general rule that a direct contempt against the court is not sufficient to disqualify a court or a judge thereof. *Patterson* v. *Colorado*, 205 U.S. 454, 463.

In discussing rule 42 (a)[3] the court said in *Sacher* v. *United States*, 343 U.S. 1, 11:

> "A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.
>
> "The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by

[3] 18 U.S.C.A. rule 42(a).

adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant."

In *Offutt* v. *United States*, *supra*, the court considered a proceeding growing out of a criminal trial where Offutt was defendant's trial counsel. From the opinion of the Supreme Court the following statement of facts appears, at 12:

* * * * * *

"* * * Almost from the outset, a clash between the presiding judge and petitioner became manifest, which, it is fair to say, colored the course of the trial throughout its 14 days, and with increasing personal overtones. The judge again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggres- [fol. 66] sive advocacy, and warned him of the consequences by way of punishment for contempt which such conduct invited. On the other hand, these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor. Such characterization of necessity derives from an abiding impression left from a reading of the entire record.

"At the close of the trial, after the jury had retired for deliberation, the judge, acting under the procedure prescribed by Rule 42 (a) of the Federal Rules of Criminal Procedure and involving the authority of *Sacher* v. *United States*, 343 U.S. 1, found the petitioner guilty of criminal contempt on the basis of a certificate filed under the Rule, containing 12 findings of 'contumacious, and unethical conduct in open court during the trial,' and ordered him committed for 10 days to the custody of the United States Marshal for the District of Columbia.

"The Court of Appeals found that four of the 12 findings amply supported the commitment, but reduced the punishment from 10 days to 48 hours. It concluded that 'the record does not support the penalty imposed. Appellant's conduct cannot fairly be

considered apart from that of the trial judge. Each responded to great provocation from the other. * * *"

The court pointed out at 17:

"* * * The record discloses not a rare flare-up, not a show of evanescent irritation—a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. * * *"

In reversing, the court suggested that the judge who imposed the sentence should invite the assignment of another judge to sit in the second hearing on the charge against the petitioner.

In the present appeal, while what we have said herein has not been in entire approval of the conduct of the district court, we do not find that he was personally in- [fol. 67] volved in controversy with the respondent or that in his rulings leading to the orders appealed from he was actuated by personal enmity toward either of the lawyers held in contempt. Accordingly we do not feel that the *Offutt* case requires that upon the record before us there should be a remandment for retrial before another judge. Whatever may have been the reasons that caused the trial judge to commit the errors which we have recounted in cases Nos. 13160, 13175 and 13176, the records before us affirmatively rebut any personal enmity harbored by the judge against the two respondents before him.

We, therefore, hold that the district court did not err in failing to refer the questions of contempt to the executive committee for assignment for hearing by another judge.

3. In addition to the specifications aforesaid, the order now under attack contains some prefatory remarks which respondent characterizes as "a diatribe without any support in the record." He refers to this language:

"* * * Both attorneys for the plaintiff herein, embarked upon a course of unprofessional, unethical, in-

> timidating, insulting, defiant, unfair and improper behavior, to foist their will upon the Court and jury and to dominate the course of procedure herein without regard to an honest and impartial administration of justice."

Inasmuch as the court's order must stand or fall on the specifications, the language in the preface is unimportant, unless it supports respondent's contention that it showed the prejudice of the trial judge and that he was "incapable of giving him any kind of a fair hearing on the issue of contempt". We cannot give it such effect. Nor does the court's language in the preface indicate that the order of contempt or the punishment therefor was based upon the conduct described other than in the specifications. In this respect, we are impressed by the reasoning of the court in *MacInnis* v. *United States*, 9 Cir., 191 F.2d 157, 161, cert. denied, 342 U.S. 953:

> " • • • The court's remarks addressed to counsel after the verdict had been returned admirably show the poise of the judge and that the sentence was based upon the statements contained in the certificate in [fol. 68] their frame of circumstance. The court's reference to the general conduct of counsel throughout the trial does not indicate that either the judgment of contempt or the punishment therefor rests upon such conduct. The court found appellant's statements to be contemptuous and measured the punishment to fit the offense. The court's remarks constitute an explanation of the fact that counsel's conduct other than the contemptuous remarks was such that the contemptuous statements would not be condoned."

In accordance with the reasons which we have stated, the order from which this appeal has been taken is reversed as to respondent Thomas C. McConnell, except as to specification 6 therein only as to which it is affirmed and this cause is remanded to the district court with instructions to vacate the sentence imposed and in lieu thereof to impose a fine of $100 on said specification 6,

to be paid by respondent Thomas C. McConnell to the clerk of the district court, pursuant to law.

Order Reversed in Part and in Part Affirmed and Remanded With Instructions.

[fol. 69] DUFFY, Circuit Judge, dissenting in part.

I agree with the majority opinion that the convictions under Specifications 5 and 7 should be reversed. I also agree that Judge Miner did not err in failing to ask the Executive Committee to assign another judge to hear the charges of contempt.

I would also reverse as to Specification 6. The majority opinion describes the difficulties the plaintiff's counsel McConnell encountered in trying to preserve his client's rights. The attorneys for plaintiff were driven to a sense of frustration due to the District Court's rulings on offers of proof. Under such circumstances, it is understandable that an attorney might say things which should not have been said. I think that was the situation in the case at bar.

However, the majority opinion does not adequately present the setting in which the McConnell statement was made. He addressed the Court as follows: "We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us." McConnell's statement occurred during the reading of the deposition of Howard E. Simpson, president of the Baltimore & Ohio Railroad. Simpson was a defendant. One of plaintiff's attorneys was reading portions of Simpson's adverse examination to lay the foundation for an offer of proof. The statement made by McConnell was followed almost immediately by a recess. When the court session was resumed, Mr. McConnell complied with the Court's ruling, and did not persist in asking the particular questions.

It might be noted that counsel's vigorous insistence on preserving his client's rights bore fruit, as the trial judge later changed his ruling. Counsel was then permitted to ask questions in the presence of the jury as a condition

precedent to the offers of proof made in accordance with Rule 43(c), Federal Rules of Civil Procedure.

Mr. McConnell has had much trial experience. Even under the stress of the exasperating conditions such as he [fol. 70] encountered, he should never have threatened to continue asking the questions in view of the Court's rulings, although he felt certain the rulings were incorrect. After the recess, when he had had time to cool down and consider the language used, he should have apologized to the Court.

Nevertheless, Mr. McConnell did comply with the Court's order. At that point there was no interference with the conduct of the trial. There was no obstruction in the administration of justice. In my view, the conviction for criminal contempt under Specification 6 should also be reversed.

[fol. 71]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. F. Ryan Duffy, Circuit Judge, Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Latham Castle, Circuit Judge.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

PARMELEE TRANSPORTATION COMPANY, a Delaware corporation, Plaintiff,

v.

JOHN L. KEESHIN, et al., Defendants.

No. 13175

In the Matter of Criminal Contempt of

THOMAS C. MCCONNELL, Respondent-Appellant.

JUDGMENT—July 6, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, Reversed as to respondent Thomas C. McConnell, except as to specification 6 therein only as to which it is Affirmed, and that this cause be and it is hereby, Remanded to the said District Court with instructions to vacate the sentence imposed and in lieu thereof to impose a fine of One Hundred Dollars ($100.00) on said specification 6, to be paid by respondent Thomas C. McConnell to the Clerk of the District Court, pursuant to law, in accordance with the opinion of this Court filed this day.

[fol. 72]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—October 5, 1961

It Is Ordered by the Court that the petition for rehearing filed herein by Thomas C. McConnell, appellant, be, and the same is hereby, Denied.

[fol. 73] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 74]

SUPREME COURT OF THE UNITED STATES

No. 498, October Term, 1961

In the Matter of Criminal Contempt of

THOMAS C. McCONNELL, Petitioner.

ORDER ALLOWING CERTIORARI—December 11, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.